LAU PING SIONG & ANOR

v.

NADOR TAWI

HIGH COURT SABAH & SARAWAK, SRI AMAN
SANGAU GUNTING J
[CIVIL APPEAL NO: 12B-1-2010-I (SG)]
16 APRIL 2012

DAMAGES: *Personal injuries - Multiple injuries - Whether sums awarded by lower court proper - Whether award for nursing care justifiable although claim not pleaded - Failure to raise objection on non-pleading - Whether amounted to waive of right to object*

The Sessions Court had awarded the respondent RM182,000 and RM25,498 in general and special damages, respectively. Before deduction for overlapping, the general damages consisted of RM34,000 for the fracture of eight ribs, RM16,000 for lung contusion, RM30,000 for *phenumohaemothorax* and RM100,000 for spinal fractures. The special damages consisted of RM4,200 for nursing care and RM20,000 to meet the cost of future surgery. In the instant appeal, the appellants contended that the general damages awarded was excessive and that the sums that should have been awarded for the injuries in the respective order set out above were RM28,000, RM4,000, RM37,500 and RM35,000. As for the special damages, the appellant contended that the award of RM4,200 for nursing care should be dismissed as that claim was not pleaded whilst the award for future surgery should not have been classified as special damages attracting interest as the said sum was yet to be incurred. In reply, the respondent contended that although the claim for nursing care was not pleaded, it was justified by reason of the respondent's injuries. As for the award for future surgery, the respondent agreed that it should have been placed under general damages.

Held (dismissing appeal but ordering sum awarded for future surgery to be placed under general damages):

(1) It had not been shown that the Sessions Court had acted upon wrong principle in making the awards or that the estimations of the various sums awarded were erroneous. (paras 16 & 25)

(2) As for the argument that the claim for nursing care was not pleaded, the appellants failed to raise the relevant objection but instead proceeded to cross-examine the relevant witness, PW2, on

her testimony of her having taken care of her father, the respondent, presumably whilst he was bed-ridden. In the circumstances, on balance of probability, it appeared justified to conclude that the appellants had waived their rights to object to the award for care and nursing. The amount claimed under this heading was also justified and was therefore maintained. (para 31)

Case(s) referred to:

Amat Majid v. Azmi Kamat & Anor [2009] 1 PIR 23 ***(refd)***
Arina Ujang v. Susof Nordin & 3 Ors [2009] 2 PIR 44 ***(refd)***
Baharuddin Sulong & Anor v. Hiew Ching Choo [2008] 1 PIR 40 ***(refd)***
Che Hanif Che Soh v. Alamgiran Shuyan Sraj Uddin Miah [2008] 1 PIR 2 ***(refd)***
Huang Chin Yeh v. Chao Chong Teck [2008] 1 PIR 63 ***(refd)***
Kedaya Jantong v. Chung Lang Hiong & Anor [2009] 2 PIR 36 ***(refd)***
Marappan Nallan Koundar & Anor v. Siti Rahmah Ibrahim [1990] 1 CLJ 32; [1990] 1 CLJ (Rep) 174 SC ***(refd)***
Mohd Al Mu'Min Shamsudin v. Selamah Jamal & Anor [2008] 2 PIR 9 ***(refd)***
Mohd Fayzul Ahmad & 2 Ors [2008] 2 PIR 60 ***(refd)***
Ngooi Ku Siong & Anor v. Aidi Abdullah [1984] 2 CLJ 163; [1984] 1 CLJ (Rep) 294 FC ***(refd)***
Perumal Sendra Yakaundan v. Kalasom Arshad & Anor [2008] 1 PIR 22 ***(refd)***
Sevaji Vythee & Anor v. Liew Leong Heng & Anor [2009] 2 PIR 62 ***(refd)***
Tan Kok Yu v. Edris Adis [2008] 2 PIR 55 ***(refd)***
Tan Kuan Yau v. Suhindrimani Angasamy [1985] 1 CLJ 429; [1985] CLJ (Rep) 323 FC ***(refd)***
Teo Pek Ngee v. Said Muda & Anor [2010] 1 PIR 10 ***(refd)***
Tineshkumar Abi Manyyu & Anor v. Che Daud B Mohd Roki & Anor [2007] 1 PIR 80 ***(refd)***
Voon Jan Choo v. Lee Chie Siang & Anor [2007] 9 CLJ 242 HC ***(refd)***

For the appellants - Allan Lao; M/s David Allan Sagah & Teng Advocates
For the respondent - Joseph Baling; M/s Khaira & Co

Reported by Ashok Kumar

JUDGMENT

Sangau Gunting J:

[1] The learned Sessions Judge had on 21 July 2010 entered judgment for the respondent in the sum on RM207,498. That sum consists of general damages (RM182,000) and special damages (RM25,498).

[2] The complaint of learned counsel for the appellants relates mainly to (a) the amount of general damages allowed by the Session Judge concerning (i) fracture of 5th to 12th ribs (8 ribs) - RM34,000, (ii) lung

contusion - RM16,000, (iii) pneumohemothorax - RM30,000, (iv) fractures at spine - RM100,000, as well as, his decision concerning the cost of nursing care in the sum of RM4,200 and the cost of future operation.

[3] According to the appellants' counsel, the award for each of the aforesaid items under (i), (ii), (iii) and (iv) should be respectively RM28,000, RM4,000, RM37,500 and RM35,000. And he contends the cost of nursing care in the sum of RM4,200 was not pleaded and must be dismissed. As regards the cost of future operation in the sum of RM20,000, he says although the amount is acceptable, it should not have been awarded as special damages and ought not attract interest.

[4] Citing *Perumal a/l Sendra Yakaundan v. Kalasom bt Arshad & Anor* [2008] 1 PIR 22, *Teo Pek Ngee v. Said b Muda & Anor* [2010] 1 PIR 10, and making reference to the compendium of Personal Injury Awards as at 26 October 2010, concerning the eight ribs learned counsel for the appellant says "a very reasonable award would be RM3,500 per rib, or RM28,000 for eight ribs."

[5] Learned counsel for the respondent points out, in arriving at the sum of RM34,000, ie, RM4,250 per rib, the learned Sessions Judge had referred to *Tan Kok Yu v. Edris Bin Adis [2008] 2 PIR [55], Mohd Al Mu'Min Bin Shamsudin v. Selamah Bt Jamal & Anor* [2008] 2 PIR 9, and *Perumal a/l Sendra Yakaundan v. Kalasom bt Arshad & Anor* (*supra*). The amount of award per rib given in each of these cases were respectively RM3,600, RM5,000 and RM1,818.18. It would be noted that averaging these three amounts would give a figure of about RM3,472.

[6] According to the respondent's counsel, having suggested RM2,500 per rib in the Session's Court, the appellant is now, at the appellate stage, suggesting RM3,500 per rib. The respondent's counsel then points out what he considers as "the average award for fracture rib is RM5,000 in both East and West Malaysia ... ", citing in support *Kedaya AK Jantong v. Chung Lang Hiong & Anor* [2009] 2 PIR 36 (RM5,000 per rib), *Amat bin Majid v. Azmi b Kamat & Anor* [2009] 1 PIR 23 (RM5,000 per rib), and *Mohd Al Mu'Min Bin Shamsudin v. Selamah Bt Jamal & Anor* (*supra*) (RM5,000 per rib), as well as, to Practice Direction No. 1/2010 dated 11 August 2010.

[7] Counsel further raises the point about the learned Sessions Judge's having taken into account overlapping by deducting 10% from the sum total awarded for fracture of the ribs, lung contusion and pneumohemothorax. With respect, as regards the RM34,000 allowed in

respect fracture of 5th to 12th ribs (8 ribs), I do not see any substantial reason why it could be considered as excessive and therefore ought to be maintained.

[8] Referring to the aforesaid Practice Direction No.1/2010 the respondent's counsel contends the computation of general damages for personal injuries in Sabah and Sarawak "should not be the same as that of West Malaysia". In support he referred to a point presumably emphasised during a meeting between Yang Amat Arif the Chief Judge of Sabah and Sarawak, the plaintiffs' lawyers and insurance companies' lawyers, that Malaysian civil servants working in Sabah and Sarawak "are paid 30% more than their colleagues in West Malaysia."

[9] The appellant's counsel's interpretation of the aforesaid contention on the part of the respondent's counsel seems indicated in his submission in reply: "In crude monetary terms, what is being indirectly said is that a Sarawakian lung is worth more than a Peninsular one." Counsel suggests "… the said Practice Direction be interpreted to apply to specific damages instead as this falls in line with differing and unique geographical situation in Sarawak whereby road access is more arduous and cost of living higher …"

[10] Learned counsel for the respondent appears not to have directly replied to the implied contention in these statements made by learned counsel for the appellants. Instead, he appears to have emphasised a point presumably gleaned from three cases reported in the PIR, that "the average award for fracture rib is RM5,000 in both East and West Malaysia …"

[11] With respect, the appellants' counsel's remark " … what is being indirectly said is that a Sarawakian lung is worth more than a Peninsular one … " seems indicative of learned counsel not to have fully appreciated the fact that cost of living is generally higher in Sarawak, and for that matter in Sabah as well, compared to the cost of living in Peninsular Malaysia. It seems to me the point presumably emphasised during the said meeting between the CJSS and lawyers for plaintiffs and insurance companies must in all probability relate substantially to the "higher cost of living" factor.

[12] In other words, due to the higher cost of living in Sabah and Sarawak, a sum of general damages for say, lung contusion, awarded to a plaintiff in Peninsular Malaysia would have a higher purchasing power compared to an equal sum awarded to a plaintiff in Sarawak and Sabah, and therefore, for the higher cost of living factor to be accounted for, awarding an appropriate higher amount of general damages for similar injury to a plaintiff in Sabah and Sarawak ought to be considered.

Otherwise, totally ignoring the 'higher cost of living' - factor, would translate the amount allowed to a plaintiff in Sabah and Sarawak being in reality significantly less although having precisely similar face value. This is, of course, without prejudice to a thorough consideration of the overall relevant circumstances which invariably would differ from case to case.

[13] Focusing on the lung contusion the appellants' counsel says the RM16,000 - award is "unwarranted". Saying the lung was only bruised and "not punctured and/or did not collapse", the amount according to counsel ought to be only RM14,000. It seems undisputed, however, the finding of fact made by the Sessions Judge presumably based on the evidence of the medical doctors Dr. Siow Sze Li (PW4), that " … there is an injury to the lung causing air to leak from the lungs to the chest cavity of the plaintiff (PW5)". As pointed out by the respondent's counsel in arriving at RM16,000, the Sessions Judge appears to have referred to the case of *Mohd Fayzul bin Ahmad & 2 Ors* [2008] 2 PIR 60 where RM16,000 was allowed for lung contusion. Except for expressing his view on the Practice Direction No.1/2010 which differs from the view of the respondent's counsel, thereafter it would appear the appellants' counsel did not make any specific reply to this aspect of the respondent's submission.

[14] It would appear, that having referred to the case of *Baharuddin bin Sulong & Anor v. Hiew Ching Choo* [2008] 1 PIR 40, the learned Sessions Judge awarded RM30,000 to the plaintiff in respect of pneumohemothorax, which, according to PW4, involves an "injury to the lung causing the air to leak to the chest cavity". Referring to the compendium of Personal Injury Awards as at 26 October 2010, learned counsel for the appellants suggests a "very reasonable" amount to be RM4,000 in respect of the lung contusion.

[15] Concerning pneumohemothorax, having referred to said compendium of Personal Injury the appellants' counsel suggests a "more reasonable" award to be RM5,500. It is to be noted, that although the total of the said two amounts comes up to only RM9,500, learned counsel for the appellants contends "the total amount to be awarded for the injuries sustained to the lungs and liver should be in the vicinity of not more than RM37,500. Having acceded to the RM10,000 - award concerning liver laceration, based on the amounts suggested by the appellants, the respondent's award in respect of injuries to the lungs and liver ought to be only RM19,500 (RM9,500 + RM 10,000).

[16] However, learned counsel for the appellants nevertheless expressed the view, that the award for injuries to the lungs and liver "should be in the vicinity of not more than RM37,500". The total amount awarded

in respect of the said injuries by the learned Sessions Judge is RM56,000 (RM16,000 + RM10,000 + RM 30,000). With respect, it would appear as not having been shown, that in arriving at the aforesaid figures (RM16,000 + RM 10,000 + RM 30,000) the learned Sessions Judge had acted upon wrong principle (see *Tan Kuan Yau v. Suhindrimani Angasamy* [1985] 1 CLJ 429; [1985] CLJ (Rep) 323 (FC)).

[17] Medical report, exh. P2, describes the spine fracture as 'fracture lumbar spine with L5S1 spondylolisthesis'. Medical report, exh. P3, describes the condition thus: "Multiple levels of transverse process fracture at L2 and L3 (right side) and spinous process fracture at L1 and L2. Spondylolisthesis (Grade 1) of L5/S1 with pars intercularis fracture." In respect of this spine fracture, the learned Sessions Judge awarded RM100,000.

[18] The RM100,000 - award appears to have been made after considering the evidence of the medical specialists concerning the nature of the injury sustained and its consequences to the plaintiff in terms of pain, disabilities and the surgery required. He appears to have also considered the past awards in similar cases, ie, *Arina Bt Ujang v. Susof B Nordin & 3 Ors* [2009] 2 PIR 44, *Huang Chin Yeh v. Chao Chong Teck* [2008] 1 PIR 63, and *Sevaji a/l Vythee & Anor v. Liew Leong Heng & Anor* [2009] 2 PIR 62.

[19] Citing *Tineshkumar a/l Abi Manyyu & Anor v. Che Daud B Mohd Roki & Anor* [2007] 1 PIR 80, *Che Hanif B Che Soh v. Alamgiran Shuyan B Sraj Uddin Miah* [2008] 1 PIR 2 and the compendium, the appellants' counsel contends: "Since the present case involves fractures of the four vertebrae with spondylolisthesis, a more reasonable award would be RM35,000".

[20] The respondent's counsel points out that "cases and figure referred to by the appellants … ie, *Tineshkumar a/l Abi Manyyu & Anor v. Che Daud B Mohd Roki & Anor* …and the compendium only referred to award for injuries and did not take into account the disabilities as a result of the disabilities." In his final reply, learned counsel for the appellants quoted portions of the judgment of the Sessions Judge, "Upon looking at the injuries suffered … and needs surgery to address the spine problem", and contends: ' … the consideration for the cost of operation on the spine was included in the assessment which awarded sum of RM100,000". And counsel says "As it has been agreed that the said sum should be moved under special damages … claiming RM100,000 in this instance would be a direct and complete overlap which cannot be allowed". Counsel then contends, "In any event, the respondent should be able to claim at most RM80,000 for the spinal injury".

[21] The appellants' counsel also contends, that the respondent's injuries are not as severe as that of Mr. Huang in the cited case of *Huang Chin Yeh v. Chao Chong Teck* [2008] 1 PIR 63. He says "Mr. Huang's injuries have left him virtually unable to conduct daily activities without the constant aid and support of another person. The same cannot be said of the respondent". Counsel contends "the award for spinal injury should be no more than RM40,000. It may be noted here that earlier on counsel has contended "In any event, the respondent should be able to claim at most RM80,000 for the spinal injury".

[22] During the proceeding on 14 March 2011, in reply to the court's question as to why in the appellant's submission dated 6 January 2011 the appellant appears have contemplated of two maximum quantum, ie, RM40,000 and RM80,000 for the fracture of the spine, the appellant's advocate told the court, "The RM80,000 in para. 16 (of the said submission) should be RM40,000". He says it is a typographical error pointing out the fact the figure RM40,000 is repeated in para. 33 of the said submission.

[23] The respondent's advocate objected to the appellant's 11th hour request for the substitution of RM40,000 for what he says has been "clearly stated in the submission … " Having considered the parties' arguments in the context of the appellant's submission, not only in para. 16 but also in paras. 17 to 19, I found it difficult to accede to the request to delete RM80,000 and substitute the figure RM40,000. It may be noted, that in comparing Huang Chin Yeh's injuries in *Huang Chin Yeh*'s case (*supra*) where the award concerning cervical spinal injury was RM100,000 and the respondent's injuries, the plaintiff's advocate observed, " … the result of the respondent's injuries are not as severe as that of Mr Huang".

[24] Having earlier said "the respondent should be able to claim at most, RM80,000 for the spinal injury", and keeping in mind counsel's reference to the case of *Huang Chin Yeh*'s case where the award for cervical spinal injury was RM100,000, learned counsel's subsequent view, that "the award for spinal injury should be no more than RM40,000 does seem to be a severely disproportionate reflection of counsel's view of the difference in severity. That is, "not as severe as" seems to have justified the reduction of some 60% instead of just 20% from the award in *Huang Chin Yeh*'s case.

[25] In any case, in the circumstances of this case, in having reached the quantum of general damages at RM100,000 for the injuries described by the general surgeon as "Multiple levels of transverse process fracture at L2 and L3 (right side) and spinous process fracture at L1 and L2.

Spondylolisthesis (Grade 1) of L5/S1 with pars intercularis fracture" (exh. P3), with respect, I do not think it could be concluded, that the learned Sessions Judge had acted upon wrong principle, and that his estimate of the aforesaid amount is erroneous (see *Tan Kuan Yau v. Suhindrimani Angasamy* (*supra*)).

[26] The appellants complain that the claim for costs of nursing was not pleaded. The respondent's counsel points out the appellants' failure to object to the testimony of the relevant witness (PW2) during the trial. The respondent maintains the appellants were not taken by surprise by PW2's testimony. The respondent's counsel says the appellants "has (sic) waived their rights to object to the award of nursing care … (and) … ought to be maintained."

[27] In addition to the non-pleading point, the appellants' counsel also contends the relevant testimony of the plaintiff's witness (PW2) "was not corroborated with requisite documentary proof." In this connection, counsel says, "…the appellants need not object to testimony of witnesses so long as the claims therein, if not previously pleaded, are not awarded. As such, the appellant has in no way, waived its right to object to the award".

[28] It seems the learned Sessions Judge did not address the defendants'/appellants' complaint, that the plaintiff's/respondent's claim for costs of nursing care is not pleaded and so must be dismissed. In allowing the said claim, *albeit*, at an amount lower than originally claimed, the Sessions Judge cited in support *Marappan Nallan Koundar & Anor v. Siti Rahmah Ibrahim* [1990] 1 CLJ 32; [1990] 1 CLJ (Rep) 174; [1990] 1 MLJ 99 (SC) and Voon Jan Choo v. Lee Chie Siang & Anor [2007] 9 CLJ 242. *Marappan Nallan Koundar & Anor v. Siti Rahmah Ibrahim* (*supra*) seems to contemplate on, *inter alia*, the justifiability or otherwise of care and nursing item.

[29] In *Ngooi Ku Siong & Anor v. Aidi Abdullah* [1984] 2 CLJ 163; [1984] 1 CLJ (Rep) 294 (FC), it was *inter alia* stated:

> General damages refer to the damage which the law 'implies in wrongs actionable *per se*' and is averred in general terms in the pleadings without the necessity of quantifying the amount. They include future loss of earnings as well as damages for pain and suffering and loss of amenities. They relate to items of damage whether pecuniary of non-pecuniary. Special damages on the other hand have to be specifically pleaded and strictly proved. They refer to past expenses and loss of earnings. The exact loss must be pleaded where the precise amount of item has become clear before the trial. Loss of future earnings or post-trial loss differs from pre-trial loss which comes under special

damages. The reason that special damages have to be specifically pleaded is in order to comply with its object which is to crystallize the issue and to put the defendants on their guard and tell them what they have to meet when the case comes on trial.

[30] In the said passage quoted from *Ngooi Ku Siong & Anor v. Aidi Abdullah* (*supra*) the Federal Court appears to be enunciating the general principle, that special damages have to be specifically pleaded. In contradistinction, *Marappan Nallan Koundar & Anor v. Siti Rahmah Ibrahim* (*supra*) seems specific in its reference to the justifiability issue. This seems to have prompted the respondent's counsel to submit, " … the plaintiff's claim for cost of nursing care is justified by reason of the injury suffered by him". In other words, if the very nature of the injury suffered by a plaintiff makes the necessity of care and nursing an irresistible inference, then it must follow as justifiable the corresponding claim for the cost thereof.

[31] In the instant case, the respondent's non-compliance with the necessity to specifically plead his claim for cost of care and nursing did not appear to have prompted the appellants/defendants to raise the relevant objection. In fact, the defendants/appellants proceeded to cross-examine the relevant witness (PW2) on her testimony of her having taken care of her father (the plaintiff) presumably while he was bed ridden. In the circumstances, on balance of probability, it would appear justified to conclude that the defendants/appellants have waived their rights to object to the award of care and nursing. Anyway, based on the testimony of PW2, the claim for the cost thereof also appears to have been justified. In the circumstances of this case, the amount awarded for cost of care and nursing is therefore to be maintained.

[32] The appellants say the cost of future operation the RM20,000 - award should not have been awarded as special damages as the event and/or sum has yet to happen or has yet to be incurred, and ought not attract interest. The respondent's counsel appears to have conceded to this contention, and the appeal was therefore allowed in that the cost of future operation should be placed under general damages. For all the reasons adumbrated hereinbefore, the appeal concerning (a) the amount of general damages pertaining to (i) fracture of 5th to 12th ribs (8 ribs) - RM34,000, (ii) lung contusion - RM16,000, (iii) pneumohemothorax - RM30,000, (iv) fracture at spine - RM100,000 and (b) the cost of nursing care in the sum of RM4,200 was dismissed.